



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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Ref: 8EPR

JUN 18 2002

Mr. William Dawson, Chief
Planning Division
U.S. Army Corps of Engineers
Attn: CECW-P (IP)
7701 Telegraph Road
Alexandria, Virginia 22315-3860

RE: Comments on Devils Lake, North Dakota Final Integrated
Planning Report and Environmental Impact Statement (FEIS)

Dear Mr. Dawson:

In the exercise of its responsibilities under the National Environmental Policy Act (NEPA), the President's Council on Environmental Quality (CEQ) regulations at 40 CFR §§ 1500-1508, and Section 309 of the Clean Air Act, the U.S. Environmental Protection Agency (EPA) has reviewed the Devils Lake, North Dakota Final Integrated Planning Report and Environmental Impact Statement (FEIS) to reduce the flooding potential from Devils Lake in North Dakota. On May 7, 2002, EPA Region 8 rated the Draft Environmental Impact Statement (DEIS) for this project as "Environmentally Unsatisfactory-Insufficient Information (EU-3)." In light of this, consistent with Agency policy, we are commenting on the FEIS.

EPA understands and shares the concern about the risks associated with a natural overflow from Devils Lake. We are not unmindful that an uncontrolled overflow could have serious consequences, particularly for the community surrounding Devils Lake. We appreciate the involvement of the Corps and the State of North Dakota in resolving the flooding concerns over the years. Our comments, in this letter and in our letter concerning the DEIS, are intended to focus on ways to deal with the flood risk in the least environmentally damaging manner.

The Corps has selected a preferred alternative that sites the outlet in an area of higher water quality. In addition, the Corps has modified the original proposal and added some project features to address Clean Water Act (CWA) and Boundary Waters Treaty requirements and to resolve other concerns raised by those who commented on the DEIS. These changes have improved the Corps' environmental analysis. These changes include:

- Construction of a sand filter system at the outlet location;
- Acquisition of riparian lands;



- Habitat enhancements;
- Environmental monitoring;
- Compensation for additional community drinking water treatment; and
- Funding through the U.S. Department of State to support efforts to resolve boundary water issues.

This letter addresses four central issues with which we continue to have concerns. The Record of Decision (ROD) should describe how you will resolve these issues.

1. **Water Quality Impacts.** The FEIS indicates that discharges from the outlet may cause exceedances, or contribute to exceedances, of downstream water quality standards, and we understand Minnesota currently is considering this matter. The State of North Dakota Department of Health, which has been previously authorized by EPA to administer the CWA Section 402 permit program, has made clear that it intends to require the project sponsor to obtain a CWA Section 402 permit. The State has further made clear that no permit can be issued if it would violate applicable water quality standards. EPA agrees that under the CWA, any Section 402 permit must ensure compliance with water quality standards. See CWA Section 301(b)(1)(C). Section 401 of the CWA provides an additional mechanism for addressing potential downstream water quality issues. We stand ready to assist both the State and the Corps if our assistance is requested. We recommend that this issue and its appropriate resolution be further described in the ROD.

2. **Boundary Waters Treaty Compliance.** We are concerned about the potential water quality impacts identified in the FEIS and how they relate to U.S. compliance with the Boundary Waters Treaty of 1909. In particular, we are concerned about the risk of biota transfer as well as the projected exceedances of water quality objectives. For example, on page 6 - 73, the FEIS states, "The outlet does not comply with the antidegradation policies promulgated under the [Boundary Waters Treaty]." In order to ensure that the operation of the outlet complies with the Treaty, the Corps should work with the U.S. Department of State (as the lead agency regarding Treaty compliance) to address outstanding water quality issues. Cooperation, at least with regard to sharing of information, appears to be already underway. We stand ready to assist both the Corps and the Department of State in this effort. We recommend that the process for resolution be included in the ROD.

3. **Invasive Species.** By proposing a sand filtration system, the Corps partially addresses biota concerns. However, the FEIS disclosed that the outlet may introduce and spread invasive species downstream, even with the proposed mitigation in place. In particular, because the sand filter will only screen out organisms of a certain size, we are concerned that pathogens, viruses, and parasites are not likely to be addressed by the filter. Appendix C of the FEIS lists conclusions and recommendations for minimizing the risks and damages from biota transfer. It also proposes actions to prevent, monitor and mitigate impacts from invasive species, along with

a potential implementation plan. We recommend that the Corps detail the plans in the ROD that they will be undertaking, including specific identification and discussion of biota in the lake that are not likely to be addressed by the sand filter and the actions that will be undertaken to prevent downstream impacts should the filter fail to contain them.

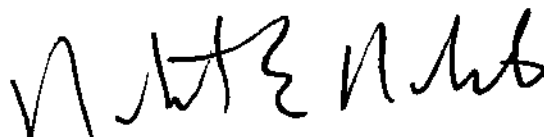
4. **404 Evaluation.** In its FEIS, the Corps stated that the CWA Section 404(b)(1) Guidelines (Guidelines) do not require an evaluation of the secondary impacts associated with the operation of the outlet, only the effects of constructing the outlet. EPA believes that this position is inconsistent with longstanding Corps and EPA interpretation and practice regarding the evaluation of secondary impacts under the Guidelines. In response to this concern, we understand that the Corps has agreed to address this issue by explicitly recognizing in its ROD that the proper interpretation of the Guidelines requires the Corps to address the secondary effects (e.g., operational impacts) of the proposed project as an integral part of the factual determinations made under 40 CFR 230.11 and compliance determination made under 40 CFR 230.12. Consequently, the ROD will also need to reflect the Corps evaluation of secondary impacts associated with the proposed outlet consistent with this interpretation.

In addition, EPA has raised concerns regarding the lack of specificity of the proposed mitigation plan which consequently limits the ability to evaluate the adequacy of the plan to effectively offset anticipated impacts from the construction and operation of the outlet. Therefore a more specific and detailed mitigation plan that includes critical details such as the extent of wetlands expected to be acquired, where the mitigation is expected to be located, and when mitigation will proceed, should be included in the ROD.

In summary, these issues should be resolved before the Corps identifies its decision on this project in the ROD. Further, our comments on alternatives in the DEIS should be considered by the Corps in identifying the environmentally preferred alternative in the ROD and in making a decision on the selection of a recommended alternative. We would be pleased to provide assistance to this end.

We appreciate your efforts to resolve EPA's concerns and continue to be available for discussions on these matters. If you have any questions, please contact Ms. Wanda Taunton of my staff at (303) 312-6364 or me at (303) 312-6308.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert E. Roberts", written in a cursive style.

Robert E. Roberts
Regional Administrator